

and which extends from the lower end to the upper end and which includes an edible source of carbohydrate and protein; and an inner phase that extends from the lower end to the upper end and includes an edible source of carbohydrate and protein wherein the inner phase has an appearance different from the outer phase and extends within the outer phase. Claim 2 further includes that the product is obtained by a process that includes filling the outer phase into a can; forming a bore into the outer phase for providing a tubular outer phase; filling the interface into the bore of the tubular outer phase; sealing the can; and retorting the sealed can.

The canned pet food product as defined in claim 6 includes an outer, tubular phase that extends from the lower end to the upper end and which includes a substantially solid, thermally gelled mixture of carbohydrate and protein; and an inner phase which extends from the lower end to the upper end and which is in the form of chunks of a formulated emulsion product in gravy wherein the inner phase has an appearance different from the outer phase and extends within the outer phase.

The process as defined in claim 9 includes the steps of filling into an outer phase including an edible source of carbohydrate and protein; forming a bore into the outer phase for providing a tubular outer phase; filling an inner phase including an edible source of carbohydrate and protein into the bore of the tubular outer phase wherein the inner phase has an appearance different from the outer phase; sealing the can and retorting the sealed can.

Applicants have recognized the need for canned pet food products which have new and interesting appearances to further stimulate interest therein. See, Specification, page 2, lines 5-6. The pet food product and processes of making same as required by the claimed invention have the advantage of having an attractive appearance of two or more discrete phases of different appearances one within the other. Since the phases are substantially discrete, the product does not have the homogeneous appearance of conventional pet foods. Further, the pet food is suitable for larger cans in which the height of the can is at least as large as the diameter of the can. See, Specification, page 2, lines 15-19.

In contrast, Applicants believe that the cited art, even if combinable, fails to disclose or suggest a number of features of the claimed invention. As even admitted by the Patent Office, the primary *May* reference (WO 98/05219) fails to disclose the outer, tubular phase features as

required by the claimed invention. Further, Applicants do not believe that the products described in May are suitable for use in larger cans where the height of the can is at least as large as the diameter of the can. See, Specification, page 3, lines 3-5. Therefore, May is clearly deficient with respect to the claimed invention.

Further, Applicants believe that the Patent Office has improperly relied on the remaining references, alone or in any hypothetical combination, to remedy the deficiencies of May. Of the secondary references, the Patent Office appears to primarily rely on Henkel, Mandanas, and Routh to support the Patent Office's position that the outer, tubular features of the claimed invention are an allegedly obvious matter of choice and/or design. Even if combinable, clearly these references are deficient with respect to the claimed invention as well. For example, Henkel merely relates to a cosmetic and not even a food product, let alone a pet food product; Mandanas, like Henkel, has nothing to do with food, particularly pet foods, but merely relates to dispensing a viscous paste from containers, such as squeezable tubes; and Routh merely relates to ice cream and products thereof. Therefore, Applicants do not believe one skilled in the art would consider that references unrelated to pet food have any relevance with respect to the specific limitations of the canned pet food product and methods thereof as defined in the claimed invention.

Of the remaining cited art, the Patent Office only generally relies on same as allegedly evidencing packaged multi-phased products wherein the phases assume various patterns. However, Applicants believe that nowhere do these references disclose or suggest the specific features, such as the outer, tubular features, as required by the claimed invention. Indeed, some of these remaining references do not even relate to pet food products. For example, Errass merely relates to a condiment product that is dispensed from a tube; and the QP Corp. references relate to peanut butter and products thereof. Therefore, Applicants do not believe that any one or hypothetical combination of these references, even if combinable, can be relied on solely to remedy the deficiencies of the other cited art.

To arrive at the claimed invention, it is respectfully submitted that the Patent Office has simply pieced together the cited art by selectively picking and choosing teachings of each of the references in an attempt to explain what the claimed invention discloses. The Court of Appeals for the Federal Circuit has criticized this motivation to combine analysis as being "hindsight

reconstructive” because the motivation to combine the references was first disclosed in the present invention. *In re O’Farrell*, 853 F.2d 894, 902-903 (Fed. Cir. 1988).

Indeed, the sheer number of 13 references, in total, suggests that the rejection is mere hindsight reconstruction of the claimed invention. If it takes 13 separate references to piece together the claimed invention, then it must be non-obvious. Further, the principal reference is clearly deficient with respect to the specific features of the claimed invention, particularly with respect to a canned pet food product that has an outer, tubular phase as even admitted by the Patent Office. Moreover, the products described in the primary May reference are not suitable for use in larger cans where the height of the can is at least as large as the diameter of the can as required by the claimed invention. Indeed, the Examiner does not appear to refute this position.

With respect to the secondary references, Applicants believe that these references are clearly deficient as well. Indeed, a number of these references do not even relate to pet food products and even some do not even relate to food products. Therefore, Applicants believe that the rejection of the pending claims, at least for the reasons set forth above, would clearly be improper either as a matter of law or fact.

Accordingly, Applicants respectfully request that the obviousness rejection be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of their patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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